Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MISSOURI PACIFIC RAILROAD COMPANY/
UNION PACIFIC RAILROAD COMPANY,
Petitioners,

VS.

CHARLES A. HARPER,
Respondent.

On Petition for Writ of Certiorari to the
Appellate Court of Illinois, Fifth District

PETITION FOR A WRIT OF CERTIORARI

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March, 1997

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QUESTIONS PRESENTED

1. Whether § 60 of the Federal Employers Liability Act, which prohibits any action to prevent railroad employees from furnishing information regarding employee injuries, pre-empts state ethical rules which bar attorneys from engaging in certain *ex parte* communications with the employees of an opposing party, as to which a conflict exists among the state and federal courts of appeal.

2. Whether the petitioners violated § 60 of the FELA by requesting FELA plaintiffs' attorneys to abide by state ethical rules governing *ex parte* communications with the employees of a party.

3. Whether there exists an "atmosphere of intimidation" with respect to reporting employee injuries which would interfere with the ability of respondent's attorneys to obtain information from petitioners' employees about respondent's injury, contrary to § 60 of the FELA.

4. Whether a trial court in Illinois had the authority to issue a permanent injunction under § 60 of the FELA authorizing respondent's attorneys to engage in *ex parte* communications with petitioners' employees on behalf of any FELA claimant they represent.

5. Whether a work rule adopted by all of the major western railroads, including petitioners, which governs who employees can give information to about accidents without the authorization of a manager violates § 60 of the FELA because it fails to include "person in interest," a term used in § 60 with respect to whom accident information may be given to.

(a) Whether petitioners' adoption of the work rule was in wilful violation of a preliminary injunction enjoining petitioners from requiring knowledge or consent of employee witness interviews regarding FELA claims.

6. Whether an order requiring petitioners to send to every one of their employees a letter, by certified mail, telling them to disregard any work rule which prevents them from providing information about employee injuries to attorneys is prejudicial because it makes no exception for disclosure of confidential or privileged reports, or for interviews during work or on railroad property.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. The Petitioners, Missouri Pacific Railroad Company and Union Pacific Railroad Company, are wholly owned by the Union Pacific Corporation.

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OPINIONS BELOW

The order of the Illinois Supreme Court denying discretionary review (Appendix, *infra*, A-) is not reported. The opinion of the Illinois Appellate Court, Fifth District, (Appendix, *infra*, A-2-A-23) is reported at 282 Ill.App.3d 19, 667 N.E.2d 1382.

JURISDICTION

The order of the Illinois Supreme Court denying discretionary review of the judgment of the Illinois Appellate Court, Fifth District, was entered on December 4, 1996. The judgment of the Illinois Appellate Court was entered on August 6, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISION INVOLVED

45 U.S.C. § 60 states:

> Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fining and imprisonment, for each offense; Provided, That nothing herein contained shall be construed to void any contract, rule or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports."

STATEMENT OF THE CASE

I. THE PERMANENT INJUNCTION ORDER

The Evidence

On September 22, 1993, Missouri Pacific Railroad Company and Union Pacific Railroad Company (the Railroads), sent a letter to the attorneys for Charles Harper (Harper), which stated, in pertinent part:

> "[U]nder no circumstances should you or anyone on your behalf communicate directly with any railroad foreman, supervisors, or office personnel about any aspects of the claim of Mr. Harper. Finally, please advise if you wish to interview any railroad employees concerning Mr. Harper's claim. Please do not conduct such interviews without our knowledge and consent.
>
> We believe that attorney ethical rules and laws of most states prohibit contact by you or anyone on your behalf from communicating about your client's claim with any person having managerial responsibility for the railroad, with any person whose statement may constitute an admission of the railroad and any person whose act or omission may be imputed to the railroad for purpose of civil liability. We expect you and others acting on your behalf to honor these principles." (Pl.Ex. 4) ("the letter")

On November 19, 1993, Harper filed a Complaint against the Railroads under the Federal Employers Liability Act (FELA) for damages for repetitive trauma injuries. (C3-4) In addition, Count III of the Complaint asked for a permanent injunction to enjoin the Railroads from using the letter requesting their knowledge and consent to employee-witness interviews. (C6, 9) Harper alleged Section 60 of the FELA authorized his attorneys to conduct *ex parte* interviews of the Railroads' employees despite any state ethical rule to the contrary. (C7, 8)

The following evidence was considered by the trial court in determining whether the permanent injunction should issue:

One of Harper's attorneys, Roger Denton, testified the letter caused his firm not to go out and interview witnesses because they were afraid the Railroads would charge them with an ethical violation. (R324-325)

Gary Barker, a railroad union official, testified that railroad management does not want employees to report injuries, and that some have gone so far as to threaten employees with their jobs if they reported an accident. (R151-152) Barker did not know of any witness in Harper's case who had been intimidated from giving information about his claim, or who refused to talk to Harper's attorneys. (R203-204) The witnesses to Harper's claim of repetitive trauma are all of the people he worked with over the past twenty-five years. (R425)

Seven of Harper's co-workers testified that for at least the last five to eight years, they had never been intimidated or threatened by anyone from the Railroads about reporting or having witnessed an accident. (R448-449, 480-481, 498, 517-518, 527-528, 551, 575-576) Several of the older workers recalled that some twenty years ago, three foremen made statements implying that jobs could be lost if someone came forward as a witness to an accident during that time. (R483-484, 486, 478-479, 531, 532, 540) These foremen were fellow union members, not company officials. (R495, 539) Because of the statements made by these now deceased or retired foremen, some laborers may still be fearful for their jobs if they report being a witness to an accident. (R534, 535, 536, 540-541)

Two current foremen testified it is their policy, and the policy of their supervisor, to report all accidents, and if you are a witness, you have to fill out an accident report. (R480, 488-489, 494, 538-539, 540, 541-542) The policy today is that workers are not discouraged from reporting, or identifying themselves as witnesses to, accidents. (R539-540, 542, 544, 590)

Roger Denton testified that in another case in which he represented Cornell Phillips, two eye-witnesses to the accident who initially agreed to give him a statement became hostile toward him after they said they had talked to a company lawyer. (R331, 332) One of those eye-witnesses, David Standridge, testified Denton

came to the hospital where Standridge's wife had just given birth. (Standridge dep. 9-10, 11) The baby was in intensive care. (Standridge 11) Standridge told Denton he had other things on his mind and was not in the mood to talk about Phillips' case. (Standridge 9-10) Standridge had never discussed talking to Denton with anyone from the Railroads. (Standridge 10, 11, 36)

Cornell Phillips testified that prior to 1987, a foreman threatened him with his job if he got involved as a witness to another guy's accident. (R124, 130-131) Phillips got involved anyway. (R131) According to Phillips, other witnesses to the same injury had the same comments made to them by this foreman. (R133) However, five of Phillips co-workers testified that they had never been threatened or intimidated by anyone from the Railroads about coming forward as a witness to an accident. (Thomas, 4-5, 6, 7; Burks, 5-6,; Parham, 5, 6; Crow, 5-6; Standridge 7-8, 12)

How The Federal Question Was Presented

The federal questions in this case were first raised when Harper filed his Complaint alleging the Railroads violated section 60 of the FELA, and alleging that section 60 pre-empted state ethical rules concerning *ex parte* communications with the employees of a corporate party. The trial court ruled on these federal questions as follows:

On June 30, 1995, the trial court entered a permanent injunction authorizing Schlichter, Bogard & Denton, Harper's attorneys, to conduct *ex parte* interviews of the Railroads' employees regarding FELA claims; and enjoining the Railroads from using letters requiring knowledge and consent to employee interviews, or in any way interfering with *ex parte* communications by Schlichter, Bogard & Denton with their employees. (C1234-1235, 1330) The trial court found Section 60 of the FELA pre-empted any state statute or ethical rule that would prohibit Schlichter, Bogard & Denton from conducting *ex parte* interviews of the Railroads' employees concerning FELA claims. (C1234-1235, 1330)

In its order, the trial court also found the Railroads have created an atmosphere of intimidation such that some employees are fearful of coming forward with information about an FELA claimant's injury. (C1332) The trial court stated representatives of the

railroad, including attorneys, have intimidated employee witnesses from voluntarily providing information to claimants' representatives. (C1332-33) No mention of any intimidation of witnesses to Harper's claim was made in the trial court's order.

In the Illinois Appellate Court, the Railroads raised the federal questions at issue by appealing the trial court's permanent injunction order of June 30, 1995 seeking reversal of that order. The Illinois Appellate Court passed on the federal questions as follows:

The Illinois Appellate Court, Fifth District, affirmed the permanent injunction order of the trial court. With respect to whether section 60 of the FELA gives Harper's attorneys the right to communicate *ex parte* with the Railroads' employees, despite state ethical rules to the contrary, the Court adopted its discussion of this issue contained in its decision at the preliminary injunction stage of this same case, *Harper v. Missouri Pacific R.R. Co.*, 264 Ill.App.3d 238, 636 N.E.2d 1192 (Ill.App. 1994) (hereinafter "*Harper I*") (App., A-24 - A-43). (App., A-13) In *Harper I*, the Court noted section 60 does not attempt to distinguish between certain types of railroad employees. Whereas, state ethical rules do protect certain categories of employees of a party from *ex parte* contacts. The Court found:

> "If Congress intended such, it could and should have set forth the distinction between classes of employees in section 60 or provided for the various States to make exceptions for certain classes of employees * * * Given the purposefully broad language of section 60 and the courts' uniformly liberal construction of that language, we find that the trial court was within its sound discretion in finding that any State statute or rule, including the Rules of Professional Conduct (134 Ill.2d R. 1.1 *et seq.*), that prohibits plaintiffs' attorneys from conducting *ex parte* interviews with the defendants' employees regarding facts incident to FELA claimants' injuries is preempted by Federal law. [Citation omitted] (App., A-39)

Furthermore, the Illinois Appellate Court held the evidence supported the trial court's finding that the actions of the Railroads created an atmosphere which intimidates employees from furnish-

ing information about cases brought under the FELA. (App., A-14) The Court cited to the testimony of several witnesses that in the past, they had been told if they saw someone injured on the job, "they shouldn't see it." (App., A-15) However, the Court failed to observe this incident took place some twenty years ago. (R436) The Court noted the testimony of a couple of witnesses that although they personally have no fear about reporting an accident, or talking to a claimants' attorney about an accident, they heard or know of other employees who are fearful. (App., A-15) In addition, it noted witness Michael Williams refused to talk to Harper's attorneys before the trial for the permanent injunction, but he did talk to the Railroads' attorneys. (App., A-15) The Court omitted the fact that the reason Williams did not want to talk with Harper's attorneys had nothing to do with being afraid of what the Railroads might do if he did. (R450, 470-471) Finally, the Court cited to the testimony of several witnesses that they would be concerned if there was a work rule against talking to an FELA claimants' attorney without first getting authorization from the Railroads. (App., A-15) The Court failed to acknowledge that the Railroads denied there was such a rule.

The Court also affirmed the scope of the injunction which was not limited Harper's case only, but "applies across the board to plaintiff's attorneys and allows them free access to conduct unrestricted, *ex parte* interviews of any and all railroad employees." (App., A-16) It found that limiting the injunction to the instant plaintiff would be an invitation to the Railroads to commit similar violations of section 60 in the future. (App., A-16)

II. THE CONTEMPT ORDER

The Evidence

Prior to the entry of the permanent injunction, the trial court entered a preliminary injunction as to Count III of Harper's Complaint based on § 60 of the FELA. (C88) The preliminary injunction was entered on December 9, 1993, and enjoined the Railroads, in part, from "requiring knowledge and consent of employee witness interviews concerning facts incident to FELA claimants' injuries." (C88, 93)

On August 2, 1994, Harper filed a petition to show cause why the Railroads should not be held in contempt of court for violating the foregoing portion of the preliminary injunction order by revising an employee work rule regarding the giving of statements. (C787, 790) The Railroads' former rule, Rule 807(2), regarding statements read:

> "Except when authorized by proper authority:
>
> (2) Information as to the facts pertaining to the injury or death of an employee must not be given to anyone except a person in interest, such as the injured employee, or an immediate relative of the injured or deceased employee, or to an officer of the law." (C. 789; Pugmire deposition exh. 2)

The Railroads' revised rule, Rule 1.2.6, provides:

> "Except when authorized by the proper manager:
>
> Information about the facts concerning the injury or death of an employee may be given only to the injured or deceased employee, an immediate relative of the injured or deceased employee, an authorized representative of the railroad, or an officer of the law." (C789; Pugmire deposition exh. 3)

In his petition for rule to show cause, Harper alleged that the Railroads' revised rule eliminated the phrase "persons in interest." (C790) In its preliminary injunction order, the trial court found "persons in interest" to whom accident information may be passed under § 60 of the FELA included attorneys representing FELA claimants. (C89) Harper alleged the effect of the Railroads taking out "persons in interest" from the rule was to prohibit employees from relating facts about employee injuries to plaintiffs' attorneys without the Railroads' authorization. (C790)

Robert Pugmire testified for the Railroads at the hearing on Harper's petition to show cause. (R598) Pugmire is Union Pacific Railroad Company's Director of Operating Rules. (Pugmire deposition, p. 4) Pugmire was on the General Code Committee, comprised of representatives from a number of different railroads, which revised the Rule book adopted by all of the major western railroads and short line railroads. (Pugmire dep., pp. 4-5) The revision of the rule book was for the purpose of making the rules

simpler and easier to understand. (Pugmire dep., pp. 5, 9-10) All of the rules were revised, not just Rule 1.2.6 on "Statements." (Pugmire dep., pp. 4-5)

The General Code Committee did not consider Rule 1.2.6 as a change from the prior rule. (Pugmire dep., p. 11) The only change concerning Rule 1.2.6 was to take out the phrase "person in interest" which the committee considered vague and could include a rail buff or newspaper reporter who were the people the committee did not want the employees to think had an implied right to interview them. (Pugmire dep., p. 10) The rule as it concerns injured employees' attorneys did not change. (Pugmire dep., p. 10) Neither the prior rule nor the revised rule specifically included injured employees' attorneys. (Pugmire dep., pp. 10-11) However, both rules include the injured employee himself. (Pugmire dep., pp. 15-16) The intent behind the inclusion of the injured employee in the rules was to let the injured employee designate who could gather information on his behalf, which would include his legal or union representative. (Pugmire dep., p. 14, 15) Pugmire believed the employees understood this intent. (Pugmire dep., pp. 14, 18, 20, 25, 26, 27) Rule 1.2.6 only applies to the employees while they are at work. (Pugmire dep., pp. 12, 31; Crow deposition, p. 11; Burks deposition, p. 10)

The revisions to the prior rules were made during a two and a half year period before April of 1994 when they took effect. (Pugmire, p. 32) Thus, Rule 1.2.6 would have been revised before December of 1993 which was when the preliminary injunction was issued. (Pugmire, p. 32)

Most of the employees who testified by deposition or at trial were not aware of Rule 1.2.6. (R491, 505, 514, 521, 536-537; Crow deposition, pp. 9-10; Burks deposition, p. 9; Thomas deposition, p. 9; Parham deposition, p. 10) The two witness who read Rule 1.2.6 before the trial did not believe it prohibited them from talking to an injured worker's attorney off railroad property. (R465, 466, 508, 509, 514-515)

Most of the employees agreed Rule 1.2.6 did not specifically state they could give statements to attorneys for injured workers, without the authorization of the railroad. (R466-467, 491-492, 506,

521) The prior rule, Rule 807(2), did not specifically state employees could give statements to attorneys either. (R495, 568-569; Pugmire deposition, pp. 10-11) Laymen such as these workers would not know what "person in interest" meant. (R573; Pugmire deposition, p. 10)

If there was a rule prohibiting employees from talking to an injured worker's attorney, some employees would not, or would be reluctant about, talking to an injured worker's attorney, unless it was approved by a supervisor. (R522, 538, 558; Crow deposition, p. 10; Parham deposition, p. 9)

How The Federal Question Was Presented

The federal question of whether the Railroads violated § 60 of the FELA by revising their work rule on "Statements" was first raised in the trial court when Harper filed his Petition for Rule to Show Cause. The trial court found that the revision, e.g., taking out the phrase "person in interest," had the effect of prohibiting employees from communicating information to Harper's and other FELA claimants' attorneys without the Railroads' authorization. (C1239) It found this revision constituted a willful and flagrant violation of the preliminary injunction order which enjoined the Railroads from "requiring knowledge and consent of employee witness interviews concerning facts incident to FELA claimants injuries." (C1239)

The court ordered the Railroads (1) to send a copy of the order and a letter in the identical form of Exhibit 1[1], attached to the order,

---

[1] Exhibit 1 states:

> "Enclosed is a copy of a Order entered on January 5, 1995 by the Honorable Daniel J. Stack of the Circuit Court for the Third Judicial Circuit, Madison County, Illinois. The Missouri Pacific Railroad Company and the Union Pacific Railroad Company have been enjoined by the Court from in any way preventing you from providing information about employee injuries to the injured employee's attorney and have been ordered to rescind or revise Rule 1.2.6 regarding furnishing information. You should disregard any rule promulgated or adopted by the company which prevents you from providing information about employee injuries to their attorneys. Specifically, Rule 1.2.6 regarding statements should be disregarded. (C1242)

to each of its employees by certified mail, return receipt requested, on or before July 15, 1995; (2) to rescind or revise Rule 1.2.6 consistent with the order; and (3) to pay Harper $150 a day for every day since April 10, 1994 through the day the rule is rescinded or revised. (C1240-1241)

In the Illinois Appellate Court, the Railroads raised the federal question involved in the contempt order by appealing that order seeking its reversal. The Illinois Appellate Court passed on the federal question as follows:

> "The trial court in its order dated December 9, 1993 noted that attorneys who represented employees asserting claims under the Act are "persons in interest." The trial court obviously believed that the removal of the words "persons in interest" approximately four months after the December 9, 1993, order was not a mere coincidence and chose to disregard Robert Pugmire's testimony that the change was made in order to make the rule simpler and easier to understand and that the "rules committee" did not consider rule 1.2.6 a change from the prior rule * * * Here, we agree with the trial court's determination that the revision was done in wilful violation of the preliminary injunction." (App., A-19)

On appeal to the Illinois Appellate Court, the Railroads also urged that the requirement that letters be sent to the employees by certified mail was burdensome, unnecessary and prejudicial. Notification of rule changes is made through the general order process. Furthermore, the mandated form letter makes no exception for interviews on railroad property or while the employees are at work, or for disclosure of confidential files.

The Illinois Appellate Court determined it was unnecessary for the letter to make exception for disclosure of confidential reports because "confidentiality in employee files is implicit." (App., A-23) It also noted the letter states Rule 1.2.6 "regarding *statements* should be disregarded, thus limiting the inapplicability of the rule to that section only." (App., A-23) The Court failed to note there was no section of the rule limited to statements. Rather, the title of

Rule 1.2.6 itself was "Statements." The Railroads' concern that the letter invited employees to set up interviews with FELA plaintiffs' attorneys during working hours and on railroad property was not addressed by the Appellate Court.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Illinois Appellate Court that 45 U.S.C. §60 Pre-empts, or Authorizes a Violation of, State Ethical Rules Barring Certain *Ex Parte* Communications Between an Attorney and the Employees of an Opposing Party Conflicts with the Decisions of a Number of United States District Courts and of the Missouri Court of Appeals, and Aggravates the Existing Split of Authority in the District Courts.

There is a conflict among the state and federal district courts as to whether Section 60 of the Federal Employers Liability Act (FELA), 45 U.S.C. §60, authorizes *ex parte* communications by an FELA plaintiff's counsel with the employees of a defendant railroad, even though such *ex parte* communications are in violation of state ethical rules.

Illinois, like most states, has adopted the American Bar Association's (ABA) Model Rule of Professional Conduct 4.2 which provides:

> "During the course of representing a client a lawyer shall not communicate or cause to communicate on the subject of the representation with a party the lawyer knows to be represented by another lawyer in that matter unless the first lawyer has obtained the prior consent of the lawyer representing such other party or as may otherwise be authorized by law." (134 Ill.2d R. 4.2)

When one of the parties is a corporation, this rule prohibits *ex parte* communication with (1) persons having managerial responsibility for the organization; (2) persons whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability; and (3) persons whose statements may constitute an admission on the part of the organization. (Official Comment to ABA Model Rule 4.2)

The Illinois Appellate Court in this case held § 60 of the FELA pre-empted Rule 4.2 and authorized Harper's counsel to conduct *ex parte* interviews of *any* of the railroad's employees regarding FELA claimants' injuries. Section 60 provides:

> " Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to *a person in interest* as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to *a person in interest* . . . shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fining and imprisonment, for each offense; Provided, That nothing herein contained shall be construed to void any contract, rule or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports." (45 USC §60) (Emphasis Added)

Under this statute, a lawyer retained by an injured railroad worker to pursue an FELA claim is a "person in interest" to whom accident information may be furnished. *Queensberry v. Norfolk & Western Ry. Co.*, 157 F.R.D. 21, 24 (E.D.Va. 1993) *citing Sheet Metal Workers Int'l Ass'n v. Burlington Northern R.R. Co.*, 736 F.2d 1250, 1252 (8th Cir. 1984)

The decision of the Illinois Appellate Court that § 60 pre-empts state ethical rules prohibiting *ex parte* communications by an FELA plaintiff's counsel with certain employees of a defendant railroad conflicts with the decisions of the United States District Courts in *Branham v. Norfolk & Western Ry. Co.*, 151 F.R.D. 67, 71 (S.D.W.Va. 1993), *Queensberry*, 157 F.R.D. at 25 (E.D.Va. 1993), *Tucker v. Norfolk & Western Ry. Co.*, 849 F.Supp. 1096, 1100-1101 (E.D.Va. 1994), *Garrett v. National Railroad Passenger Corp.*, Civ.A. No. 89-8326, 1990 WL 122911 (E.D.Pa. Aug. 14, 1990), and *O'Brien v. Union Pacific R.R. Co.*, No. CV93-00490 (Neb. Sep. 20, 1994), and with the decision of the Missouri Court of Appeals in *State ex rel. Atchison, Topeka, & Santa Fe R.R. v. O'Malley*, 888 S.W.2d 760 (Mo.App. 1994). These jurisdictions hold that § 60 does not pre-empt state rules of professional conduct or authorize FELA plaintiffs' counsel to communicate *ex parte* with railroad employees within the purview of state ethical rules.

There is also a conflict among the United States District Courts themselves on the pre-emption issue. In *United Transp. Union v. Metro-North Commuter R.R. Co.*, No. 94 Civ. 2979 (S.D.N.Y. 1995) and *Blasena v. Consolidated Rail Corp.*, 898 F.Supp. 282 (D.N.J. 1995), the District Courts agreed with the Illinois Appellate Court that § 60 pre-empts state ethical rules. The Georgia Court of Appeals in *Norfolk Southern R.R. Co. v. Thompson*, 208 Ga.App. 240, 430 S.E.2d 371 (1993) also espoused the view that *ex parte* interviews in FELA cases do not violate state ethical rules because FELA plaintiffs' counsel are authorized by § 60 to conduct such interviews. *Id.*, 430 S.E.2d at 376

Due to the conflict not only between Illinois and the United States District Courts, but between the United States District Courts themselves, this Court must resolve whether § 60 of the FELA pre-empts state ethical rules regarding an attorney's *ex parte* communications with the employees of the opposing party.

II. It is Important that this Court Resolve the Existing Conflict Between the State and United States District Courts As to the Effect of 45 U.S.C. §60 on State Rules of Professional Conduct.

Resolution of the conflict over whether § 60 of the FELA authorizes *ex parte* communications by an FELA plaintiff's counsel with a defendant railroad's employees in violation of state ethical rules will obviously affect many other persons and companies besides the actual litigants in this case. The resolution of this issue will affect FELA plaintiffs' attorneys, FELA plaintiffs, FELA defendants and their employees, FELA defense counsel, and the states' ability to enforce their rules of professional conduct in FELA cases.

First, in FELA lawsuits filed in Illinois, due to the Illinois Appellate Court's decision in this case, all FELA plaintiffs' counsel are given express permission to interview *ex parte* any employee of a railroad to obtain statements concerning an FELA claim. Plaintiffs' counsel are given this right under the auspices of federal law, despite the fact that Illinois considers the practice unethical.

Second, the law in FELA cases is in a state of confusion due to the conflict between the State and United States District Courts, and

between the United States District Courts themselves, as to the effect of § 60 on state rules of professional conduct. As a result, the application of § 60 to FELA plaintiffs and their investigation of claims, and to FELA defendants and their defense of claims, is dependent upon the jurisdiction the case is filed in. This Court has held that the FELA "is to have uniform application throughout the country * * * " *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 244, 63 S.Ct. 246, 87 L.Ed. 239 (1942) *quoting Panama R.R. Co. v. Johnson*, 264 U.S. 375, 392, 44 S.Ct. 391, 68 L.Ed. 748 (1924) Without a decision by this Court in this case, inconsistent application of § 60 throughout the country would result, contrary to the requirement of uniformity in application of FELA law.

It is illogical and unfair to give FELA plaintiffs' counsel in one jurisdiction the right to conduct *ex parte* interviews with any railroad employees, but to deny that right to FELA plaintiffs' counsel in another jurisdiction. By the same token, to make the right of an FELA defendant to conduct its defense with the protection of state ethical rules regulating *ex parte* communications with its employees dependent on the jurisdiction the case is filed in is irrational and unjust. Indeed, the inconsistent application of § 60 may result in more unfairness to an FELA defendant who has no control over where the case is filed. At least an FELA plaintiff can choose the jurisdiction in which to file his lawsuit, which is any jurisdiction the railroad does business in.

FELA litigants are not the only ones affected by the decision of the Illinois Appellate Court. In addition, the practical effect of a finding of pre-emption is to enjoin enforcement of Illinois Rule of Professional Conduct 4.2 and similar regulations of other states in FELA cases. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it [and members of the public benefitted by the statute] suffers a form of irreparable injury." *Motor Vehicle Board v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351, 98 S.Ct. 359, 54 L.Ed.2d 439 (1977)

Furthermore, absent a clear pronouncement from this Court, the states should not be forced to except plaintiffs' attorneys in FELA

cases from what the states consider unethical conduct. As stated in *O'Malley*, "[i]t would be an illogical rule that made the identical attorney conduct ethical or unethical depending on the underlying law of the client's cause of action." *O'Malley*, 888 S.W.2d at 763

III. The Decision of the Illinois Appellate Court that 45 U.S.C. §60 Pre-empts State Ethical Rules Governing Ex Parte Communications With the Employees of a Represented Party is Erroneous.

In its decision of August 6, 1996, the Illinois Appellate Court, Fifth District, adopted the discussion contained in its previous decision in this same case ("*Harper I*") for its holding that section 60 gives plaintiff's attorneys the right to communicate *ex parte* with defendants' employees. (App., A-13, *citing Harper v. Missouri Pac. R.R. Co.*, 282 Ill.App.3d 19, 636 N.E.2d 1382, 1201-1202 (5th Dist. 1994).) In *Harper I*, the Illinois Appellate Court found § 60 pre-empted any state statute or ethical rule regarding *ex parte* interviews of railroad employees because:

> "section 60 in no way attempts to distinguish between managerial employees and other railroad employees. If Congress intended such, it could and should have set forth the distinction between classes of employees in section 60 or provided for the various States to make exceptions for certain classes of employees." *Harper I*, 636 N.E.2d at 1202

This oversimplified interpretation of § 60 to conclude pre-emption in favor of the plaintiffs' attorneys' bar ignores rules established by this Court for determining pre-emption.

There is a presumption that Congress did not intend the federal statute to displace state law where the federal statute does not explicitly state it pre-empts state law. *Maryland v. Louisiana* 451 U.S. 725, 746, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981) Furthermore, where the field which Congress is said to have pre-empted has traditionally been occupied by the States, a court must assume that the historic police powers of the States were not to be superseded by a federal statute unless that was the clear and manifest purpose of Congress. *Rice v. Santa Fe Elevator* 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)

This Court has recognized that the field of regulating attorneys' conduct is one traditionally occupied by the States, and is one in which the States have a great interest. The States have a compelling interest in the practice of professions within their boundaries, and as a part of their power to protect the public health, safety, and other valid interests, they have broad power to establish standards for regulating the practice of professions. *Goldfarb v. Virginia State Bar* 421 U.S. 773, 792, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975) The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice and have historically been "officers of the courts." *(Id.)*

Therefore, contrary to the Illinois Appellate Court's decision, in the area of regulating attorneys' conduct, there must be a presumption that Congress did not intend for § 60 to pre-empt that area of State law where § 60 does not explicitly provide for pre-emption.

A state statute or regulation may also be pre-empted where Congress creates a scheme of federal regulation so pervasive as to leave no room for supplementary state regulation. *Fidelity Federal Savings & Loan Assn. v. De la Cuesta* 458 U.S. 141, 153, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982) The intention of Congress to regulate exclusively under the Commerce clause will not be implied unless the federal regulation is plainly inconsistent with state regulation of the same subject. *Gilvary v. Cuyahoga Valley Ry. Co.* 292 U.S. 57, 60, 50 S.Ct. 573, 78 L.Ed. 1123 (1933) A high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act. Any conflict must be "irreconcilable * * * The existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute." *Rice v. Norman Williams Co.* 458 U.S. 654, 659, 102 S.Ct. 3294, 73 L.Ed.2d 1042 (1982) The decisions of the United States Supreme Court enjoin seeking out conflicts between state and federal regulations where none clearly exist. *English v. General Electric Co.*, 496 U.S. 72, 90, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990)

Congress' intent in enacting section 60 is explained in the legislative history which, in pertinent part, provides:

> "[A] substantial number of the railroads subject to the [Federal] Employers Liability Act have promulgated rules which prohibit employees from giving information concerning an accident to anyone excepting certain specified company officials and claims agents.
>
> The purpose of the amendment under consideration is to prohibit the enforcement of such rules and permit those who have information concerning the facts and circumstances of a personal injury to give statements to the injured employee or his dependents, or to someone authorized to represent him or them." S.Rep. No. 661, 76th Cong., 1st Sess. 5 (1939)

Thus, section 60 "was designed to prohibit the enforcement of *company* rules inhibiting the free flow of information * * * " *Sheet Metal Workers*, 736 F.2d at 1252 (Emphasis added) In including section 60 in the FELA, the authors recognized the danger "that railroad agents would coerce or intimidate employees to prevent them for testifying * * * " *Hendley v. Central Georgia R.R. Co.*, 609 F.2d 1146, 1150 (5th Cir. 1980) Section 60 "prohibits a railroad from disciplining or attempting to discipline an employee from furnishing information to an FELA plaintiff." *Id.* at 1150-1151

Based on the legislative history behind § 60 and the language of the statute itself, the District Court in *Branham* determined that § 60 "has reference to conduct on the part of the railroad-employer which inhibits the furnishing of information by an employee, not to ethical rules regulating the conduct of an ' officer of the legal system.'" *Id.*, 151 F.R.D. at 71 "[T]he statute is a prohibition [against railroad conduct] rather than an authorization [to an FELA plaintiff's lawyer]." *Id.*

Similarly, in *Garrett*, the District Court explained:

> "While [section 60] prevents the railroad from hindering or preventing any employee `from furnishing voluntarily information to a person in interest' regarding the facts of an accident, it does not authorize plaintiff's counsel to commu-

> nicate with an employee *ex parte* in violation of Rule 4.2 once litigation has begun. Section 60 only prohibits the railroad from, through a policy or practice of intimidation or otherwise, barring employees from furnishing information regarding the facts of an accident voluntarily." *Garrett*, 1990 WL 122911 at *2

Likewise, in finding no conflict between § 60 and state ethical rules, the Missouri Court of Appeals in *O'Malley* noted:"

> "Section 60 [and the disciplinary rule] can be read harmoniously. Section 60 refers to conduct on the part of the railroad/employer which inhibits the furnishing of information by an employee of the railroad, not to ethical rules regulating the conduct of an attorney who is an officer of the court. It was designed to combat retaliatory rules and practices that some railroads used to completely prevent their employees from furnishing information to FELA litigants. * * * [The disciplinary rule does not deny] access to these witnesses. A railroad attorney's presence at the time of the employee interview does not prevent a full free flow of information or intimidate the employee, and any affirmative conduct on the part of the railroad to stifle the employee witness is already specifically prohibited by §60. [citations omitted]" *O'Malley*, 888 S.W.2d at 763

Because state ethical rules regulating attorneys' *ex parte* communications with the employees of an opposing party are not "irreconcilably" in conflict with the purpose and intent of § 60, the decision of the Illinois Appellate Court that § 60 pre-empted, and authorized a violation of, RPC 4.2 was erroneous.

Since § 60 does not authorize an FELA plaintiff's attorney to violate state ethical rules, the Railroads' letter does not contravene § 60. Roger Denton, one of Harper's attorneys, testified the letter inhibited him from interviewing railroad employees because of what he perceived as a threat of being brought up on ethical charges if he did so without the knowledge or consent of the Railroads. The Railroads deny that the letter is or was intended to be threatening. Furthermore, the letter mentions possible unethical conduct only

with respect to *ex parte* communications with those employees covered by ABA Model Rule 4.2. Since § 60 does not authorize Harper's attorneys to breach Rule 4.2, the letter's reference to anticipated compliance with that ethical rule does not violate § 60 either.

IV. There is No "Atmosphere of Intimidation" with Respect to Reporting Employee Injuries Which Would Interfere with the Ability of Respondent's Attorneys to Obtain Information from Petitioners' Employees about Respondent's Injury.

The Illinois Appellate Court also affirmed the trial court's finding that the Railroads violated section 60 by creating an atmosphere which intimidates employees from furnishing information about claims brought under the FELA. The Court refers to the testimony of several witnesses that they were told if they see an injury, "they shouldn't see it." Ignored by the Court is the testimony that this statement was made over twenty years ago by *foremen* who are now either deceased or retired. (R436, 478-479) Foremen are not company officials, they are in the same union as the men who work under them. (R495, 539) Therefore, assuming these foremen made such statements, they were acting out of their own self-interest, and not on behalf of the Railroads.

Moreover, it was undisputed that the policy of the current foremen is that employees must report all accidents. (R488-489, 494, 539-540, 541) This is also the policy of the Supervisor over the foremen and Harper's co-workers. (R541-542) That Supervisor has been there for at least five to eight years. (R407, 447-448, 480, 498, 517, 527-528, 551, 575) For at least the last five to eight years, none of Harper's co-workers have ever been intimidated, harassed, or threatened about reporting accidents or about giving information as a witness to an accident. (R448, 449, 480, 481, 482, 498, 500, 517, 518, 528, 529, 551, 552, 575, 576) They did not have any fear of retaliation by the Railroads if they gave information about an accident to an injured employee's attorney. (R. 449, 459-460, 470-472, 482-483, 500-501, 519-520, 529-530, 548-549, 553, 577, 590-591, 594)

The evidence of isolated statements made to several workers twenty years ago by fellow union workers is not sufficient to prove there is currently a "general atmosphere" created by the Railroads such that witnesses to Harper's claim would be fearful of giving information about his injury. The Appellate Court suggests it would have been difficult for Harper to get employees who were intimidated by the Railroads to testify at trial that they were intimidated. (App., A-14) However, assuming *arguendo* such a suggestion has any validity, there were other ways Harper could have proven his case.

For example, at the hearing for the preliminary injunction, Harper's attorney testified about difficulties he allegedly encountered ten years ago in getting statements from eye-witnesses for Cornell Phillips' FELA case against the Railroads. (R321, 322) The preliminary injunction gave Harper's attorneys one and a half years to interview any witness to Harper's claim *ex parte* prior to the trial for the permanent injunction.[2] At the permanent injunction trial, Harper's attorneys did not testify they encountered any witness to Harper's claim who refused or was reluctant to give them a statement concerning his FELA claim. If there was this "atmosphere of intimidation" which interfered with Harper's attorneys' ability to obtain statements from witnesses to Harper's claim, then Harper's attorneys would and should have testified to that effect, as they did with respect to the Cornell Phillips case. Harper should not be permitted to sustain his burden of proof by asking a court to assume the witnesses to his claim were intimidated from testifying they were intimidated.[3]

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[2] The witnesses to Harper's claim of repetitive trauma are all of his co-workers for the past twenty-five years of which there are hundreds. (R334, 425)

[3] Other ways Harper could have proven his allegation that the witnesses to his claim were inhibited by an "atmosphere of intimidation" from giving statements to Harper's attorneys were to call retired or disabled co-workers to testify or to cross-examine the Railroads' witnesses with respect to this allegation.

In contrast, the Railroads called seven of Harper's co-workers who testified they were not intimidated about giving information about another worker's injury to his attorney. The Railroads also presented the testimony of five co-workers of Cornell Phillips who disputed his claim of intimidation. (Thomas dep., pp. 4-5, 6, 7; Burks dep., pp. 5-6, 7-8; Parham dep., pp. 5, 7-8; Crow dep., pp. 5, 6, 7; Standridge dep., pp. 7-8, 12, 13-14, 24-25) Further, the testimony of David Standridge refuted Denton's testimony that Standridge's unwillingness to give him a statement in the Phillips case was due to the actions of the Railroads' attorney. (Standridge dep., pp. 9, 10, 11, 12, 36) In light of the Railroads' *affirmative* evidence repudiating Harper's claim of an "atmosphere of intimidation" inhibiting the investigation of his FELA injury, Harper did not sustain his burden of proof.

V. A Trial Court in Illinois Does Not Have the Authority to Issue Injunctive Relief Under 45 U.S.C. §60 Giving Blanket Authorization to Respondent's Attorneys to Engage in *Ex Parte* Communications with Any and All Railroad Employees.

The trial court did not limit the injunctive relief to Harper's case. It gave broad relief to Schlichter, Bogard and Denton to conduct *ex parte* interviews on behalf of any FELA claimant it now represents or may represent in the future. (C1234-1235, 1330) However, this suit was not brought in the name of Schlichter, Bogard and Denton. Nor were all FELA claimants represented by Schlichter, Bogard and Denton made plaintiffs to this lawsuit.

In *Zepeda v. United States I.N.S* 753 F.2d 719 (9th Cir. 1983), the court, citing numerous other cases, held without a properly certified class, injunctive relief cannot be granted on a class-wide basis, even to enjoin violations of the United States Constitution. In part, the court relied on the established law that the scope of an injunction can only be as broad as is necessary to provide relief to the named plaintiff. *Zepeda*, 753 F.2d at 727-730

Harper cited *ICC v. Keeshin Motor Express* 134 F.2d 228 (7th Cir. 1943) in support of the trial court's authority to enjoin the Railroads' conduct vis a vis all plaintiffs or potential plaintiffs

represented by Schlichter, Bogard and Denton. The federal government, through the Interstate Commerce Commission, instituted the action in the *Keeshin Motor* case. The Interstate Commerce Act expressly vests the ICC with the authority to institute actions for violations of the Act. All of the cases cited by the court in affirming the unrestricted territorial scope of the injunction were likewise actions brought by the federal government pursuant to express statutory authority. *Id.* at 231-232

Section 60, however, does not authorize a private plaintiff to act as a pseudo-attorney general to enjoin violations of the statute. Nor does our legal system grant an individual plaintiff standing to act on behalf of all persons alleged to be similarly situated. If this principle were not true, there would be no need for class actions. *Zepeda*, 753 F.2d at 727-730

Furthermore, numerous courts throughout the country have held § 60 of the FELA does not authorize FELA attorneys to violate state ethical rules on ex parte communications with employees of a railroad defendant. *Branham*, 151 F.R.D. at 71; *Queensberry*, 157 F.R.D. at 25; *Tucker*, 849 F.Supp. at 1100-1101; *Garrett*, 1990 WL 122911; *O'Malley*, 888 S.W.2d at 763; *O'Brien*, slip.op. at 6 The permanent injunction order in this case giving such authorization to Schlichter, Bogard and Denton with respect to lawsuits filed in other states merely invites counter-injunctions enjoining that authorization.[4] A court in one state is not required by either the full faith or credit clause nor principles of comity to give legal effect to an injunction issued in another state. See, *James v. Grand Trunk Western R.R. Co.* 14 Ill.2d 356, 152 N.E.2d 858, 862-863 (1958) (It is proper for an Illinois court to refuse to recognize and give legal effect to an injunction issued by a court of a sister state restraining prosecution of a case in Illinois.)

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[4] Schlichter, Bogard & Denton's main office is in St. Louis, Missouri. Under Missouri law, attorneys representing injured workers in FELA cases are still bound by Rule of Professional Conduct 4.2. *O'Malley*, 888 S.W.2d at 763

VI. The Work Rule Adopted by the Major Western Railroads Governing to Whom Employees Can Give Accident Information to Without the Authorization of a Manager Does Not Violate 45 U.S.C. §60.

Union Pacific Railroad Company was just one railroad among many railroads involved in a joint effort to revise the Rule book adopted by the major railroads. (Pugmire dep. 4-5) All of the rules were revised. (Pugmire, pp. 4-5) The purpose of the revision of the rules was to make them simpler and easier to understand. (Pugmire, pp. 5, 9-10)

One of the revisions made was to the rule on "Statements."

The former rule, Rule 807, read, in part:

Statements

"Except when authorized by proper authority:

(2) Information as to the facts pertaining to the injury or death of an employee must not be given to anyone except a person in interest such as the injured employee, or an immediate relative of the injured or deceased employee, or to an officer of the law." (C789; Pugmire deposition exh. 2)

The revised rule, Rule 1.2.6, effective April 10, 1994, provides, in pertinent part:

1.2.6 Statements

"Except when authorized by the proper manager:

Information about the facts concerning the injury or death of an employee may be given only to the injured employee, an immediate relative of the injured or deceased employee, an authorized representative of the railroad, or an officer of the law." (C. 789; Pugmire deposition exh. 3)

The revised rule eliminated the phrase "persons in interest," a phrase also used in Section 60. On June 30, 1995, the trial court held the Railroads in contempt for deleting "persons in interest" from the revised rule, finding this action was in violation of a preliminary injunction. In its December 9, 1993 preliminary injunction order, the trial court noted "persons in interest" under § 60 include

attorneys representing employees making FELA claims. Pursuant to § 60, the Railroads were enjoined from requiring knowledge or consent of employee witness interviews concerning facts incident to an FELA claim.

The revision made to Rule 1.2.6, which has been adopted by many railroads, was not in violation of § 60 on which the trial court's preliminary injunction was based. In pertinent part, § 60 states that any rule:

> "[t]he purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void * * * "

It was not the intent or purpose of Rule 1.2.6 to prevent employees from furnishing information to the injured employee or his attorney. Indeed, the intent of the rule was just the opposite.

The General Code Committee, comprised of representatives from many railroads, took out the phrase "person in interest" from the rule because they considered it vague and could include a rail buff or newspaper reporter. (Pugmire, p. 10) These were the people the committee did not want the employees to think had an implied right to interview them. (Pugmire, p. 10) Neither the prior rule nor the revised rule expressly included injured employees' attorneys. (Pugmire, pp. 10-11) However, both rules include the injured employee himself. (Pugmire, pp. 15-16) The purpose of including the injured employee in the rule was so that he could designate who could gather information on his behalf, such as his legal or union representative. (Pugmire, p. 14, 15)

Accordingly, by deleting the phrase "person in interest" from the rule, it was not the intent of the railroads to change the prior practice of allowing employees to give statements to attorneys for injured workers. (Pugmire, pp. 10-11, 14, 15)

With respect to the effect of Rule 1.2.6 on the employees themselves, none of the employees who testified were aware that the rule concerning giving statements had changed. (R. 491, 505, 514, 521, 536-537; Crow deposition, pp. 9-10; Burks deposition, p. 9; Thomas deposition, p. 9; Parham deposition, p. 10) The two

witnesses who might have read the new rule before the trial did not believe it prohibited them from talking to an injured worker's attorney during non-working hours. (465, 466, 508, 509, 514-515)

After being prompted by Harper's attorneys, most of the employees agreed the rule did not specifically state they could give statements to attorneys for injured workers, without the authorization of the railroad. (R. 466-467, 491-492, 506, 521) However, the prior rule did not specifically state they could give statements to attorneys for injured workers either. (R. 495, 568-569; Pugmire, pp. 10-11) Laymen such as these workers would not know what "person in interest" meant. (R. 573; Pugmire, p. 10)

No employee has ever been disciplined or investigated for giving truthful information to an attorney for an injured worker. If it was even considered to bring up an employee witness for such an investigation, Pugmire would be called to interpret the rule and the investigation would be canceled. (Pugmire, p. 28) Section 60 "prohibits a railroad from disciplining or attempting to discipline an employee from furnishing information to an FELA plaintiff." *Hendley*, 609 F.2d at 1150-1151

The change made to Rule 1.2.6, namely taking out the phrase "person in interest," simply did not have any effect on the long established and sanctioned practice of employees being allowed to give information to the legal representatives for injured workers. It was only when Harper's attorneys emphasized that the rule did not specifically state attorneys for injured workers were included in the rule that the witnesses agreed the rule could be interpreted that way. However, the witnesses who read the rule themselves prior to trial had a different understanding. Their understanding and the understanding of the employees in general is that they are not prohibited from talking to attorneys for injured workers because that is the way it was under the prior rule, even though the prior rule did not expressly state it, and the way it has always been.

VII. Petitioners' Adoption of the Work Rule Was Not in Wilful Violation of the Preliminary Injunction.

By revising the rule, the Railroads did not act in wilful violation of the preliminary injunction order so as to be subject to contempt[5]. At the show cause hearing, the Railroads' Director of Operating Rules, Robert Pugmire, unequivocally testified that the revision to Rule 1.2.6 was not intended to change the prior rule in effect as it concerned attorneys for injured employees.

Furthermore, Rule 1.2.6 only applies to the employees while at work. (Pugmire, pp. 12, 31) The Illinois Appellate Court held the preliminary injunction could not apply while the employees are at work or on the Railroads' property. *Harper I*, 636 N.E.2d at 1204 Finally, the revision to the rule was done *before* the preliminary injunction was entered. The revisions to the prior rules occurred during a two and a half year period before April of 1994. (Pugmire, p. 32) Rule 1.2.6 was revised sometime during that time. (Pugmire, p. 32) It was revised before December of 1993 when the preliminary injunction was issued. (Pugmire, p. 32) Since the rule was revised before the preliminary injunction order was even in existence, the Railroads could not have acted wilfully to violate that order.

VIII. The Letter Petitioners Were Ordered to Send to Every One of Their Employees, by Certified Mail, Fails to Protect Against Disclosure of Confidential and Privileged Information, and Interviews During Work or on Railroad Property.

Part of the contempt order requires the Railroads to send a copy of the following letter to every one of its thousands of employees, by certified mail:

> "Enclosed is a copy of a Order entered on January 5, 1995 by the Honorable Daniel J. Stack of the Circuit Court for the Third Judicial Circuit, Madison County, Illinois. The Mis-

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[5] Proof of wilful disobedience of a court order is essential to a finding of contempt. *In re Marriage of Betts*, 155 Ill.App.3d 85, 507 N.E.2d 912, 921

souri Pacific Railroad Company and the Union Pacific Railroad Company have been enjoined by the Court from in any way preventing you from providing information about employee injuries to the injured employee's attorney and have been ordered to rescind or revise Rule 1.2.6 regarding furnishing information. You should disregard any rule promulgated or adopted by the company which prevents you from providing information about employee injuries to their attorneys. Specifically, Rule 1.2.6 regarding statements should be disregarded." (R1242)

The Railroads' employees are accustomed to having changes in work rules communicated to them through the general order process. (Pugmire, p.7) Advising them, instead, by certified letter would not only be burdensome, but would likely be ineffective since the employees are not accustomed to that method of notification of rule changes.

Furthermore, the content of the letter is prejudicial to the Railroads. The letter does not make an exception for interviews on railroad property or during the employees' working hours. If these letters go out inviting employees to set up *ex parte* interviews with FELA claimants' attorneys at any time and any place, the Railroads will be unable to safeguard the safety of those attorneys while on railroad property, and the operation of the Railroads' business will be disrupted. *See Harper*, 636 N.E.2d at 1204

Furthermore, the letters require the Railroads to instruct their employees to disregard Rule 1.2.6 in its entirety: The letter instructs: "Rule 1.2.6 regarding statements should be disregarded." Rule 1.2.6 is entitled "Statements."

The entire rule was not the subject of the rule to show cause. Another part of the rule entitled "Statements" provides:

> "Information in the files or in other privileged or confidential reports of the railroad concerning accidents or personal injuries may be given only to an authorized representative of the railroad." (Pugmire deposition ex. 3)

Section 60 of the FELA states that it shall not be construed to "void any . . . rule . . . with respect to any information contained in the files of the carrier, or other privileged or confidential reports." 45 U.S.C. § 60 If the letters required by the contempt order go out, the employees would be invited to purge the Railroads' files and disclose confidential and privileged reports and information to FELA claimants' attorneys, and the Railroads could do nothing about it.

CONCLUSION

For the reasons stated herein, certiorari should be granted.

Respectfully submitted,

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